

September 24, 2012

Andy Rogerson
123 Hazelmere Drive
Folsom, CA 95630

Re: Your Request for Advice
Our File No. A-12-130

Dear Mr. Rogerson:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”)¹ and supplements prior assistance provided in the *Rogerson* Advice Letter, No. I-12-123. Again, we emphasize that advice is based on the facts presented (*In re Oglesby* (1975) 1 FPPC Ops. 71) and solely on the provisions of the Act.

QUESTION

Does the Act’s permanent ban prohibit you from assisting your former agency, under the agency’s contract with your private engineering firm, with specifications for an existing bridge project if you previously participated in developing the specifications as a state employee?

CONCLUSION

The performance of your firm’s contract, which was awarded after you left state employment, is a new proceeding to which the permanent ban does not apply. However, because you participated in developing the specifications incorporated into your firm’s contract with CalTrans, you have previously participated in the drafting or awarding phase of this contract and are therefore prohibited from making any appearance or communication on behalf of your firm, or assisting your firm in making an appearance or communication, for the purpose of influencing a proceeding involving the material modification of the contract. Finally, we express no opinion regarding any assistance you may have provided your firm in securing the contract.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

As more fully described in the *Rogerson* Advice Letter, No. I-12-123, you were a Senior Chemical Testing Engineer for the State of California before leaving state service on December 3, 2009. As a state employee, you worked for the Department of Transportation (“CalTrans”) at its Transportation Laboratory, serving as the Chief of the Chemical Testing Branch. Currently, you are employed by a private engineering firm, which was awarded CalTrans Contract No. 04A3819 on December 5, 2011, to provide CalTrans Source Inspection and Materials Engineering services for a variety of CalTrans projects including the new East Span of the Oakland Bay Bridge (CalTrans Contract No. 04-0120F4).

As a former state employee and Senior Chemical Testing Engineer, you were responsible for providing input and analysis of coating systems on structures, preparing reports on coating conditions, and provided recommendations for maintenance or replacement of coating systems for several hundred projects across California including the new East Span of the San Francisco Oakland Bay Bridge. Specific duties you performed as a state employee included the following:

- Served as one of the approximately 15 members of the Protective Coatings Committee, which provided technical input and recommendations related to the application of protective coatings and assisted in the development of general Standard Special Provisions (SSPs) used on multiple CalTrans projects including the Carquinez Bridge, the Skyway, the Benicia Martinez Bridge, and the new East Span of the San Francisco Oakland Bay Bridge.
- Supervised operations at the chemical testing laboratory, at which testing and evaluation of coating systems was performed, and assisted the Protective Coatings Committee in finalizing the general specifications that were later used in large bridge projects across California including CalTrans Contract No. 04-0120F4.
- Provided input regarding general specifications to construction personnel and structural materials representatives regarding the suitability of materials on hundreds of projects across the state, including the New East Span of the San Francisco Oakland Bay Bridge, and communicated test results to CalTrans personnel assigned to specific projects.

ANALYSIS

As a former CalTrans employee, you are currently and will remain subject to the permanent ban, under which you are generally prohibited from making any appearance or communication on behalf of your engineering firm, or assisting your engineering firm in making an appearance or communication, for the purpose of influencing a proceeding involving specific parties if you previously participated in the proceeding as a CalTrans employee.

As we previously advised, the permanent ban does not apply to a “new” proceeding even when the proceeding is related to or grows out of a prior proceeding in which the official had

participated. (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) Moreover, the application, drafting, and awarding of a contract, license, or approval is considered a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson* Advice Letter, No. A-98-159; *Blonien* Advice Letter, No. A-89-463.)

Based upon the facts provided, you previously participated as a CalTrans employee in the finalization of general specifications that were used in the Bay Bridge Contract (CalTrans Contract No. 04-0120F4) and worked in conjunction with CalTrans contractors to ensure compliance with contract specifications. Additionally, the specifications you participated in developing for the Bay Bridge Contract were incorporated in your firm's contract with CalTrans (CalTrans Contract No. 04A3819), under which your firm has been hired to assist CalTrans and CalTrans contractors with the specifications provided in the Bay Bridge Contract.

While you previously worked for CalTrans to ensure that contractors comply with the Bay Bridge Contract specifications, this previous work is distinct from your work on behalf of your current firm, which was hired to independently assist CalTrans and CalTrans Contractors with the Bay Bridge Contract specifications after your departure from state employment. Moreover, while you participated in developing the specifications your firm has contracted to assist with, the performance of CalTrans Contract No. 04A3819 is a separate proceeding from the awarding and drafting of the contract. Accordingly, assisting CalTrans and CalTrans contractors with the specifications for the Bay Bridge Contract under CalTrans Contract No. 04A3819 is a new proceeding to which the Act's permanent ban does not apply.

We must, however, distinguish the performance of CalTrans Contract No. 04A3819 and the drafting or awarding of the contract. Because CalTrans Contract No. 04A3819 requires your firm to assist CalTrans and CalTrans contractors in complying with the specifications you participated in developing, you have previously participated in the drafting or awarding phase of CalTrans Contract No. 04A3819. Considering your previous participation, you are therefore prohibited from making any appearance or communication on behalf of your firm, or assisting your firm in making an appearance or communication, for the purpose of influencing a proceeding involving the material modification of CalTrans Contract No. 04A3819 including an appearance or communication to influence (1) the amendment or revocation of the existing contract; (2) the issuance or awarding of a substantially similar contract; or (3) agency decisions that, although still within the contract's terms, are likely to result in more than a *de minimis* change in the level of services or goods provided by your firm from that originally contemplated by the agency. (*Del Valle* Advice Letter, No. A-12-086.)

We also caution that our conclusion that the permanent ban does not currently prohibit you from assisting CalTrans or CalTrans contractors with the specifications you previously developed *does not apply* to any assistance you may have provided your firm that may have assisted the firm in securing CalTrans Contract No. 04A3819. Because the Commission does not provide assistance regarding past conduct, we express no opinion as to whether your past participation in developing specifications for the Bay Bridge Contract precluded you from

assisting your current firm in securing a contract to assist CalTrans in accessing compliance with those specifications.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl